2013 WL 10161948 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Bronwyn Benoist PARKER, Appellant/Cross-Appellee,
v.
William D. BENOIST, Appellee/Cross-Appellant.

No. 2012-CA-2010.
November 25, 2013.

On Appeal from the Chancery Court of Yalobusha County, Mississippi (Case No. 11-06-56)
Hon. Percy Lynchard, Chancellor
Oral Argument Requested

Brief of Appelees/Cross-Appellants

Grady F. Tollison, Jr., MBN 8240, Taylor H. Webb, MBN 104180, 103 N. Lamar Avenue, Suite 201, P.O. Box 1216, Oxford, MS 38655, Telephone: 662.234.7070, Facsimile: 662.234.7095, for appellee/cross-appellant The Estate of Billy Dean "B.D." Benoist.

Rebecca B. Cowan, MBN 7735, Currie, Johnson, Griffin & Myers, P.A., 1044 River Oaks Drive, Jackson, MS, 39232, Telephone: 601.969.1010, Facsimile: 601.969.5120, for appellee/cross-appellant William D. Benoist.

***ii** TABLE OF CONTENTS

***iv** The following abbreviations are used herein for citations:
R. – Record Citations;
T.E. – Trial Exhibits;
T.T. – Trial and Hearing Transcripts;
S.T. - Supplemental Transcript;

***v** TABLE OF AUTHORITIES

CASES

***ix STATEMENT OF THE ISSUES**

ISSUES OF PETITIONER/APPELLANT

I. Whether the lower court erred when it failed to recognize a good faith and probable cause exception to the no-contest clause in the 2010 Will.

II. Whether the lower court erred in ruling that Benoist, as Executor of the Estate, pay a retainer of $20,000 to the Tollison Law Firm.

III. Whether the lower court erred in failing to remove Benoist as the Executor of the Estate during the pendency of the will contest.

ISSUE OF RESPONDENT/CROSS-APPELLANT

I. Whether the lower court erred in failing to award attorneys' fees incurred in defending the 2010 Will to the Estate of Billy Dean "B.D." Benoist and William D. Benoist, individually, as provided for by the no-contest clause contained in the 2010 Will.

***1 STATEMENT OF THE CASE**

I. STATEMENT OF THE FACTS

A. The Parties

The decedent and testator, Billy Dean "B. D." Benoist ("B.D.") was married to Mary Gunter Benoist ("Mary"). (T.T. 171:2-7). B. D. and Mary had two children: a daughter, Bronwyn Benoist Parker ("Parker") and a son, William D. Benoist ("Benoist"). *Id.*

B. B.D. and Mary's 1998 Wills

In 1998, B.D. and Mary executed separate but identical wills. (R. 134; R. 147-156); *See also* (T.E. 4). Both wills were four pages long and were drafted by the same scrivener and executed on the same date. *Id.* Both wills created a credit shelter **trust** for the benefit of the surviving spouse. *Id.* Both wills also named the same two residuary beneficiaries and provided them both with fifty (50) percent inheritances. *Id.* Both wills appointed B.D. and Mary's two children, Parker and Benoist, to serve as Co-Trustees of the credit shelter **trust**. *Id.* Upon the death of either Mary or B.D., the Co-Trustees were to place into the **trust** the largest amount of assets - both real and personal property - of the deceased spouse that was exempt from federal estate tax by reason of the unified credit and state death tax credit allowable to his or her estate. *Id.*

The Co-Trustees were to hold and manage the credit shelter **trust** during the lifetime of the surviving spouse and pay all net income of the **trust** for the benefit of the surviving spouse so long as he or she lived. *Id.* Further, the Co-Trustees could pay such sums from any part of or all of the principal of the **trust** estate as reasonably necessary for the support, health and maintenance of the surviving spouse. *Id.* At the death of the surviving spouse, the Co-Trustees were to distribute outright, either in case or in kind or any combination thereof, all of the remaining assets of the **trust** estate to Benoist and Parker in equal shares, per stiripes. *Id.*

***2 C. Mary's Death**

On May 5, 1999, Mary G. Benoist died, and pursuant to her will, all of her assets, which were valued at less than the 1999 tax exclusion of $650,000 vested in the Mary G. Benoist **Trust** (the "**Trust**"). (R. 79). Cash totaling more than $369,000 placed in the **Trust** as well as real property including the family home and seven (7) acres of land surrounding the family home. *Id.* Although an additional 200 acres appeared on the Yalobusha tax rolls as being in the **Trust**, the land was never conveyed to Mary; therefore, upon her death, it did not vest in the **Trust**. (T.T. 265:9-11). On July 1, 1999, Parker and Benoist, as Co-

Trustees of the **Trust** opened a **Trust** account at Merrill Lynch for the purpose of holding certain monies and investments for the health and maintenance of B.D. during his lifetime. (R. 79; R. 98-108). Over the course of the next ten (10) years, B.D. received monthly withdrawals of income from the credit shelter **trust** for his support, health and maintenance. (R. 80). In addition, B.D. withdrew a total of $244,310.03 above the monthly disbursements of income generated by the **trust** account for various reasons. (R. 82).

D. Benoist's Divorce

On January 5, 2009, Sheila Benoist ("Sheila"), filed for divorce from Benoist. (T.T. 11:21-29; T.T. 12:1). The divorce was difficult on Benoist financially. (T.T. 11:29; T.T. 12:1). Dana O'Brien ("O'Brien"), a family law attorney, represented Benoist in his divorce. (T.T. 53:58). B.D. was extremely upset over Benoist's marital difficulties. (T.T. 423:6-12). B.D.'s sister-in-law, Joyce Gunter Gesslin ("Gesslin"), testified that "he was broken hearted over that," and that he said, "if your children are in trouble, you're in trouble too." (T.T. 423:6-12).

Gesselin assisted Benoist in opening a banking account in Grenada to prevent a relative of Sheila's who worked at the bank in Coffeeville from divulging Benoist's banking transactions. ***3** (T.T. 424:7-27). This banking account was opened with eighty thousand dollars ($80,000) provided by B.D. (T.T. 448:3-5).

During Benoist's divorce, the presiding chancellor awarded bonds totaling eighty thousand dollars ($80,000) to Sheila. (T.T. 41:15-22). Benoist and Sheila originally obtained these bonds as a gift from B.D. who jointly titled them in both of their names, making them marital property. (T.T. 41:15-22). B.D. felt responsible for Benoist losing that money because he was the one who jointly titled the bonds. (T.T. 41:15-22).

Benoist testified at trial that he had been on disability since 2000, for severe cluster headaches, which requires him to take Methadone three (3) times a day. (T.T. 6:2-11). As a result, Benoist has not been able to stay very active since his headaches began and stays at home most of the time. (T.T. 6:13-21).

E. B.D.'s Treatment with Dr. Cooper McIntosh

On February 10, 2009, Dr. Cooper McIntosh, an internist in Oxford, saw B.D. as a new patient. (T.E. 17). Dr. McIntosh testified that Parker volunteered at that visit that B.D. had accidentally taken Lyrica that had actually been prescribed for his son. (T.T. 338:25-29; T.T. 329:1-5). Despite Parker's insinuation that B.D.'s accidental usage of Benoist's medication posed a serious threat to B.D.'s health, Dr. McIntosh also testified that the drug would do him no permanent harm and that "[i]t really did not mess him up." (T.T. 339:20-29).

On March 24, 2009, B.D. presented at Dr. McIntosh's for a follow-up visit. (T.E. 17). Dr. McIntosh's notes from that visit stated that "Mr. Benoist carries significant dementia. It is probably vascular in nature." (T.E. 17). However, Dr. McIntosh also testified that he did not "think [the diagnosis] would affect competence." (T.T. 340:29; T.T. 341:1).

On March 31, 2009, B.D. presented again at Dr. McIntos's. (T.E. 17). Dr. McIntosh's notes from that visit state "[t]he patient showed diffuse degenerative changes and a compression ***4** fracture." (T.E. 17). Dr. McIntosh, nevertheless, testified that this diagnosis could not have been correct because B.D.'s condition had improved. (T.T. 342:11-28). Records from visits to Dr. McIntosh on April 15, 2009 indicated that B.D.'s condition had substantially improved. (T.E. 17) Dr. McIntosh went so far as to say that B.D. "look[ed] a lot better." Records from a June 18, 2009 visit also echo this sentiment, as Dr. McIntosh noted that "[t]he patient's mental status seems to be better." (T.E. 17)

On January 27, 2010, B.D. requested that Dr. McIntosh assess his mental functioning. (T.T. 343:11-21). Dr. McIntosh believed that B.D.'s cognitive abilities were "[f]or his age and everything... surprisingly pretty good." (T.T. 344:9-12). During this visit, Dr. McIntosh administered a mini-mental status exam to assess cognition. (T.T. 344:22-29;T.T. 345:1-2). B.D. scored a 26 out

of a possible 30 points on the mini-mental exam, which, according to Dr. McIntosh, was "not bad." (T.T. 345:3-6, T.E. 27). Dr. McIntosh also testified that, "I've seen folks that I would still consider them competent that would have scored - - have scores much less than this." (T.T. 345:12-16). At B.D.'s request, Dr. McIntosh also prepared a letter in which he stated that he believed B.D. was competent. (T.E. 27, T.T. 346:8-11). Over the entire time Dr. McIntosh treated B.D. he "never saw him where I would say he was incompetent over, what, almost two years, a year and a half." (T.T. 348:1-3). And that, to a reasonable degree of medical certainty within his area of specialty, he believed B.D. was competent. (T.T. 351:5-9).

F. B.D.'s Relationship with Walt Parker

Contrary to the representations made by Parker, B.D. and Walt did not always enjoy a good relationship. A serious rift developed between the two of them in late 2008, however, even prior to that time, it was clear that B.D. did not hold Walt in high esteem. B.D. often referred to Walt as "dumb ass" because B.D. was less than impressed with his building abilities. (T.T. ***5** 427:6-9). Specifically, B.D. believed that Walt could not "build a dog house without assistance." (T.T. 427:6-9).

The relationship between B.D. and Walt began to deteriorate even further when Walt began relating to others that B.D. had harassed a woman. (T.T. 396:1-5). B.D. maintained that there was no truth to this rumor. (T.T. 396:18-22). B.D. also expressed concern over Walt telling people that B.D. had gotten so drunk that he could not get out of his swing at 9:00 in the morning. (T.T. 421:8-19). B.D. again maintained that this story was not true. (T.T. 421:20-24). These various accusations by Walt greatly upset B.D. such that he was prepared to "put him off his property." (T.T. 422:1-5).

B.D. was also concerned that Walt was attempting to obtain a power of attorney over him. (T.T. 428:3-14). Furthermore, B.D. believed that Walt had plans to develop B.D.'s property into rental property. (T.T. 271:9-12). Benoist also shared these concerns. (T.T. 17:37). Such plans undoubtedly upset B.D. further as he had always believed that his land should be used exclusively by family and friends. (T.T. 429:11-18). As Natalie Hutto explained, one of B.D.'s primary motivations in drafting a new will was to prevent Walt from interfering with the portion of his estate he intended to bequeath to Parker. (T.T. 271:13-17). Hutto testified that B.D. said to her, "I've run him out of here, but I don't **trust** him as far as I can throw him, and I want to make sure my daughter is taken care of. And I want -- whatever I give to her, I don't want him to have anything to do with it." (T.T. 271:13-17). Furthermore, B.D. was convinced that Bronwyn and Walt would not treat Benoist well after he passed away. (T.T. 420:23-29).

G. The Drafting of the 2010 Will

In early 2010, B.D. contacted Ralph Yelverton at Yelverton and Stubblefield to inquire about or engage them to assist him in distributing assets from the **Trust** to himself. (T.T. 264:10-14; T.T. 261:15-18). O'Brien, the attorney who represented Benoist in his divorce, referred B.D. ***6** to Yelverton and Stubblefield. (T.T. 262:3-4). Although B.D. originally contacted one of the partners, Natalie Hutto ("Hutto") was included on the call as the associate who would be working on the file. (T.T. 261, 18-22).

Hutto, after her first conversation with B.D., was struck by how savvy and knowledgeable he was concerning the **Trust** and what needed to be done for the assets to be transferred to him. (T.T. 263:14-29; T.T. 264:1-6). Eventually, Hutto and B.D. worked out a partial distribution of the land in the **Trust**. (T.T. 267:3-15). B.D., impressed by Hutto's work in assisting him with this partial distribution, approached her about drafting a new will for him. (T.T. 267:17-27). B.D. previously retained Craig Brewer, the scrivener of his original will, to draft a new will for him, but, he was dissatisfied with how little progress had been made. *Id.* At the time B.D. discussed drafting a new will with Hutto, she had never met Benoist. (T.T. 268:20-22). Furthermore, Hutto testified that Benoist had no input with regard to the drafting of the will. (T.T. 281:1-6).

During their discussions related to the drafting of the 2010 will, B.D. outlined exactly how he wanted the will to distribute his estate. (T.T. 268:26-29; T.T. 269:1-16; T.T. 272-274). In particular, B.D. explained to Hutto that he wanted to place the property given to Parker in his new will into a **trust** because he did not **trust** her husband, Walt. (T.T. 270:25-29; T.T. 271:1-4). Although B.D. wanted Parker to be taken care of, he did not want Walt to have anything to do with Parker's inheritance. (T.T. 271:6-17). Hutto also discussed her concerns regarding the unequal distribution of property between Benoist and Parker, especially in

regard to the family home. (T.T. 275:6-8). B.D. explained that he had already given Parker a home and Mary's jewelry, which was worth over $100,000. (T.T. 275:5-20).

Hutto also explained that during the several months in which she dealt with B.D., his personality remained the same. (T.T. 277:3). Furthermore, Hutto testified that B.D. "just knew ***7** what he wanted, how he wanted to do it, and if I offered opinions or different suggestions, he would say, well, no, Natalie, this is what I want." (T.T. 277:12-15). Ultimately, B.D. executed the 2010 Will on May 27, 2010. (T.T. 281:12-16). However, B.D. noticed that certain descriptions of property on page four of the will were incorrect. (T.T. 284:12-20). This error included property B.D. intended to place in Parker's **trust**. (T.T. 284:12-20). B.D. told Hutto that the nickname she had attributed to the property was incorrect, and that the description of the property was incorrect as well. (T.T. 282-284). Hutto asked B.D. to note this on the will, which he did. (T.E. 14). Hutto then went to the courthouse to examine the property records, believing that B.D. was wrong, however, she eventually discovered that B.D. was correct. (T.T. 284-285). Neither Hutto, nor Gary Crafton, the other attesting witness to B.D.'s execution of the will noticed anything wrong with B.D. on the day he executed the will. (T.T. 282:27-29; T.T. 283:1-10; T.T. 390:24-29) B.D. executed the revised version of the 2010 Will on June 4, 2010. (T.T. 287:2-7).

H. B.D.'s Death

On May 30, 2011, B.D. died, and the instant will contest began. R. 30. On June 11, 2012, a trial by jury commenced, and Benoist introduced into evidence the entire record of the probate proceedings, which included the 2010 Will. (T.T. 2:7-29). Article XIV of the 2010 Will contains the forfeiture clause at issue in this case. (T.E. 1; R. 60). At the conclusion of the trial, the jury found that the 2010 will was valid. (T.T. 511:13-26).

II. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On June 9, 2011, Bill Benoist ("Benoist") filed a *Petition for Probate of Last Will and Testament and for Letters Testamentary*, seeking to probate the 2010 Will of B.D. Benoist ("B.D."). (R. 30-64). Pursuant to that Petition, the Chancery Court of Yalobusha County admitted the 2010 Will to probate and granted Letters Testamentary to Benoist. (R. 65-67). On ***8** June 20, Bronwyn Benoist Parker ("Parker"), claiming to have no knowledge of the 2010 Will, offered for probate a will executed by B.D. on Janary 16, 1998. (R. 132-189).

On August 31, 2011, the lower court conducted a hearing and, upon ore tenus motion, entered an Order on September 26, 2011 that consolidated a cause of action pertaining to the **Trust** with the two (2) causes of action pertaining to the Estate of B.D. Benoist. (R. 71-72). On October 20, 2011, Parker filed an *Amended Complaint as to the **Trust** of Mary G. Benoist* and joined as a respondent the Estate of B.D. Benoist. (R. 76-131). Concurrently, Parker also filed an *Amended Petition for Probate of the 1998 Last Will and Testament of Billy Dean "B. D.'s Benoist and Contesting the Probate of the 2010 Will.* (R. 132-189).

On December 9, 2011, Benoist filed a *Petition for Authority to Liquidate Estate Assets and Pay Estate Liabilities*, seeking the lower court's permission to sell church bonds belonging to the Estate in order to pay certain liabilities, including a retainer fee of $20,000 to the Tollison Law Firm, retained by Benoist to handle "certain litigation concerning the Estate." (R. 347-363). Pursuant to this Petition, the lower court conducted a hearing on December 21, 2011, and after considering the pleadings and hearing argument of counsel, ruled from the bench in favor of Benoist by granting his Petition. (R. 364-365).

On December 19, 2011, Parker filed a *Petition to Remove William D. Benoist as Executor of Estate of Billy Dean "B. D.'s Benoist, Deceased and to Appoint Administrator/Administratrix CTA.* (R. 372-383). On December 28, 2011, counsel for Parker wrote counsel for Benoist advising that Parker had decided to abandon her claims against the Estate in the **Trust** action and attached a proposed *Agreed Order of Dismissal with Prejudice.* (R. 469-470). On December 29, 2011, counsel for Parker wrote Judge Percy Lynchard confirming that Parker would dismiss all claims against the Estate. (R. 513-514). On January 5, 2012, Parker filed a *Motion to Reconsider or Alter and Amend Order Allowing Estate to Liquidate Assets* asserting that Parker's ***9** willingness to dismiss all claims against the Estate would eliminate the need for the Estate to retain counsel to defend the Estate

against litigation. (R. 408-473). On February 17, 2012, the lower court conducted a hearing on the *Amended Petition to Remove William D. Benoist as Executor of the Estate of Billy Dean "B. D." Benoist, Deceased, to Appoint Administrator/Administratrix CTA, and to Order Inventory and Accounting and on the Motion to Reconsider or Alter and Amend Order Allowing Estate to Liquidate Assets.* After reviewing the pleadings and hearing argument of counsel, the lower court denied both of Parker's Motions. (R. 649-650).

On January 26, 2012, Benoist, in his capacity as the executor of the Estate of B.D. *Benoist, filed a Petition to Exclude Beneficiary Bronwyn Benoist Parker and Order Payment of Attorney's Fees.* (R. 533-537). On June 11, 2012, a trial by jury commenced in this matter. (R. 848-849). At the conclusion of the trial, the jury found that the 2010 Will was valid. (T.T. 511:13-26). On July 17, 2012, Benoist filed a *Supplement to Petition to Exclude Beneficiary Bronwyn Benoist Parker and Order Payment of Attorney's Fees.* (R. 880-884). On August 27, 2012, the Chancellor entered an Order excluding Parker as a beneficiary under the 2010 Will and ordering her to pay all attorneys' fees and court costs associated with the will challenge. (R. 925-927). Following the entry of that Order, Parker filed a *Motion to Reconsider Order Granting Respondent's Petition to Exclude Bronwyn Benoist Parker and Order Payment of Attorney's Fees.* (R. 928-940). On November 12, 2012, the Chancellor entered an Order upholding Parker's exclusion as a beneficiary under the will but declining to assess attorneys' fees against her. (R. 1072-1074).

On December 5, 2012, Parker filed a Notice of Appeal to this court, and later on December 10, 2012, filed an *Amended Notice of Appeal.* (R. 1075-1088; 1105-1112). On December 6, 2012, Bill Benoist, in his capacity as executor of the estate of B.D. Benoist, filed a ***10** notice of cross-appeal on behalf of the estate. (R. 1082-1088). On December 7, 2012 Bill Benoist individually, through counsel Rebecca B. Cowan of Currie, Johnson, Griffin & Myers, filed a Notice of Joinder in the cross-appeal. (R. 1089-1090).

***11 SUMMARY OF THE ARGUMENT**

In this case, the trial court adequately resolved the majority of the issues presented to it. First, the lower court did not err when it refused to recognize a good faith and probable cause exception to the no-contest clause contained in the 2010 Will. Although this is a question of first impression in Mississippi, several factors indicate that such a provision is valid. The primary concern when analyzing a will is to give effect to the testator's intent. The record clearly establishes that B.D. held great concern regarding Benoist's decline in health as well as his son-in-law's designs on his estate. The record also clearly shows that B.D. drafted a new will specifically to dispose of his property in a manner that he believed would address these concerns, which included drafting the no-contest clause in order to insure that his intent was respected. Additionally, several previous Mississippi cases dealing with similar clauses in wills that place a condition on a bequest have been upheld as valid. Furthermore, public policy supports the validity and enforcement of no-contest clauses. Even if this court determines that a good faith and probable cause exception should be adopted with respect to no-contest clauses, Parker failed to establish that her challenge to the 2010 Will met that standard. Finally, even if this court determines that a good faith and probable cause exception should be adopted with respect to no-contest clauses, such a holding should only be applied prospectively and not to these litigants so as to put testators and attorneys on notice of the new rule and to prevent harsh results in this case.

Second, the lower court correctly allowed Benoist in his capacity as executor of B.D.'s Estate to pay a $20,000 retainer to the Tollison Law Firm from Estate funds. Both Mississippi statutory law and case law clearly establish that an executor is entitled to recover attorney fees from the estate when defending a will contest. Furthermore, the 2010 Will provides that the executor may retain an attorney for any reason and to reasonably compensate them from the Estate.

***12** Third, the lower court correctly denied Parker's attempt to remove Benoist as Executor of the Estate and appoint a temporary administrator during the pendency of the will contest. Mississippi's appellate courts generally defer to the chancellor's decision on these matters, as they did in the case law cited provided by Parker in support of her position, in this regard. Furthermore, the record on appeal does not contain the transcript of the hearing on this matter, and there are no exhibits attached to the motions made by Parker in the lower court. Consequently, there is nothing in the record that can establish that the chancellor abused his discretion in denying Parker's request.

Finally, the trial court committed error in failing to award attorney fees to the Estate and to Benoist individually pursuant to the terms of the no-contest clause contained in the 2010 Will. Although this question also appears to be one of first impression in Mississippi, several authorities from other jurisdictions provide compelling arguments supporting such awards

ARGUMENT

I. STANDARD OF REVIEW

This Court employs a limited standard of review on appeals from chancery courts. *Reddell v. Redell,* 696 So.2d 287, 288 (Miss. 1997). "If substantial credible evidence supports the chancellor's decision, it will be affirmed." *Id.* (citing *Carrow v. Carrow,* 642 So.2d 901, 904 (Miss. 1994)). "The Court will not interfere with the findings of the chancellor unless the chancellor was manifestly wrong, clearly erroneous or a wrong legal standard was applied." *Reddell,* 696 So.2d at 288 (citations omitted). This Court will not replace the chancellor's judgment with its own. *Madden v. Rhodes,* 626 So.2d 608, 616 (Miss. 1993). Thus, this Court must examine the entire record and accept "that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of facts." ***13** *Cotton v. McConnell,* 435 So.2d 683, 685 (Miss. 1983). However, when reviewing a chancellor's legal findings, this court applies a *de novo* standard of review. *In re Last Will and Testament of Carney,* 758 So.2d 1017 (Miss. 2000).

RESPONDENTS' RESPONSE TO PETITIONER/APPELLANT'S ISSUES ON APPEAL

II. The Trial Court Properly Enforced the Forfeiture Clause in B.D. Benoist's 2010 Will

Testators often employ no-contest clauses to avoid will contests that generate hostility and publicly air family conflicts and private details. *Donegan v. Wade,* 70 Ala. 501, 505 (Ala. 1881). The general rule sustaining the validity of no-contest clauses is well established. 23 A.L.R. 4th 369 § 2[a] (1983). There are, however, two prevailing views on the enforcement of those clauses. Some courts hold the clauses absolutely valid, so long as the beneficiary's action falls within the scope of the clause's proscribed conduct, regardless of good faith or probable cause. 97 C.J.S. *Wills* § 1594.[1] Other courts find that a beneficiary who challenges the will in good faith or for probable cause does not violate the no-contest clause. *Id.*[2] In the latest edition of Wills and Administration of Estates in Mississippi, Robert Weems points out, "[n]o Mississippi case on this question has been found." §8:23. Forfeiture of legacy for unsuccessful contest, Wills and Administration of Estates in Mississippi (3d ed.).

While Mississippi appellate courts have only minimally examined no-contest clauses, they have recognized their purpose. The Mississippi Court of Appeals examined the application of no-contest clause nearly identical to the no-contest clause in B.D.'s 2010 Will when it upheld a chancellor's conclusion that the purpose of the clause was "to discourage the beneficiaries from ***14** *contesting the Will,* not challenging the *administration* of the Estate." *In re Estate of Thomas,* 28 So.3d 627, 638 (Miss. Ct. App. 2009) (en banc) (emphasis in original). The court declined to enforce the clause because it found that the beneficiaries had only petitioned to remove the executor, which did not constitute a challenge to the validity of the instrument itself, strongly suggesting that a challenge to the will excludes the contesting beneficiaries. *Id.* The Mississippi Supreme Court has also recognized, but declined to apply, a no-contest clause in *In re Estate of Holmes,* 961 So.2d 674 (Miss. 2007), only because it found the entire will void after an attesting witness renunciated his signature.

A. The Testator's Intent Should Control

The 2010 Will reads, in pertinent part:

> If any beneficiary hereunder (including but not limited to, any beneficiary of a **trust** created herein) shall contest the probate or validity of this Will or any provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision thereof from

> being carried out in accordance with its terms *(regardless of whether or not such proceedings are instituted in good faith and with probable cause)*, then all benefits provided for such beneficiary are revoked and such benefits shall pass to the residuary beneficiaries of this Will (other than such beneficiary) in the proportion that the share of each such residuary bears to the aggregate of the effective shares of the residuary. Further, such person contesting my Will shall pay all attorneys fees and court costs associated with the Will contest or related action... Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all of the provisions of this Will and the provisions of this Article are an essential part of each and every benefit.

2010 Will at 27, Article XIV (emphasis added); (T.E. 1). The Chancellor found that B.D. intended for this clause to apply to any challenge to his will and to apply regardless of whether the challenge was made with good faith and probable cause: "[i]n this situation, the decedent, B.D. Benoist, went to great lengths in order to make it clear that a contest of this will, whether brought in good faith or not, had serious consequences. The contestant, Bronwyn Parker, was well aware of the consequences of that. He made it -- he being the decedent, made it as clear as ***15** could possibly be made that an unsuccessful challenge of that will carried the consequences of eliminating her as a beneficiary under the will." (S.T. 33:16-27).

The record also clearly supports the Chancellor's finding. During B.D.'s discussions with Natalie Hutto related to the drafting of the 2010 will, B.D. outlined exactly how he wanted the will to distribute his estate. (T.T. 268:26-29; T.T. 269:1-16). In particular, B.D. explained to Hutto that he wanted to place the property given to Parker in a **trust** because he did not **trust** her husband. (T.T. 270:25-29; T.T. 271:1-4). Although B.D. wanted Parker to be taken care of, he did not want Walt, her husband, to have anything to do with her inheritance. (T.T. 271:6-17). Hutto also discussed the unequal distribution of property between Benoist and Parker, especially in regard to the family home. (T.T. 275:6-8). B.D. explained that he had already given Parker a home in addition to Mary's jewelry, which was worth over $100,000. (T.T. 275:5-20).

"The paramount duty of the court is to ascertain the intent of the testator... and give effect to such intent unless contrary to law or public policy." *Cross v. O'Cavanagh*, 198 Miss. 137, 21 So.2d 473, 474 (Miss. 1945); *See also* 96 C.J.S. *Wills* § 902. Having determined the intent of the testator, Mississippi law clearly provides that his intent should be given effect unless it is contrary to law or public policy. The enforcement of no-contest clauses against a contestant regardless of the contestant's good faith and probable cause is not in contravention of any law or public policy in Mississippi.

i. The Enforcement of No-Contest Clauses Without Recognition of a Good Faith and Probable Cause Exception is Not in Contravention of Mississippi Law

Both parties as well as the trial court agree that there are no cases addressing the issue of no-contest clauses in Mississippi. S.T. 32:3-29. Furthermore, there are no Mississippi statutes that address no-contest clauses in Mississippi. *See* Miss. Code Ann. §§ 91-5-1 et seq. Parker does argue, however, that the enforcement of no-contest clauses is contrary to Mississippi law ***16** establishing that forfeitures of property are not favored. While Parker's assertion is, generally, correct, it has no application in this case. Simply put, no-contest clauses do not place a beneficiary at risk of forfeiture. Forfeiture is defined as the divestiture of property without compensation. Black's Law Dictionary 661 (7th ed. 1999). Practically speaking, what this means is that forfeiture can only occur when a person loses property to which that person possessed a legal right. *See* Gerry W. Beyer et. al., *The Fine Art of Intimidating Disgruntled Beneficiaries with in Terrorem Clauses*, 51 SMU L. Rev. 225, 266 (1998). A no-contest clause simply places a condition on a gift that the beneficiary must comply with in order to obtain the property. *Id.* The enforcement of a no-contest clause does not result in forfeiture; instead, it prevents the beneficiary from obtaining an interest in the property in the first instance. *Id.* Consequently, the fact that Mississippi law does not favor forfeiture has no bearing on the resolution of this issue.

ii. The Enforcement of No-Contest Clauses Without Recognition of a Good Faith and Probable Cause Exception is Not in Contravention of Mississippi Public Policy

Many courts sustain no-contest clauses because they prevent unnecessary and largely futile litigation, which wastes estate assets. Martin D. Begleiter, *Anti-Contest Clauses: When you Care Enough to Send the Final Threat*, 26 Ariz. St. L.J. 629, 634. [3] "Studies which have been made show that only a very small percentage of will contests made on the grounds of defective execution, mental incapacity or undue influence are successful." *Barry v. Am. Sec. & Trust Co.*, 135 F.2d 470, 473 (D.C. Cir. 1943). Furthermore, the encouragement of litigation is obviously contrary to public policy. As one court explained:

Preliminarily, it is to be observed that a condition such as [a no-contest provision], not only does no violence to public policy; but meets with the approval of that policy. Public policy dictates that the courts of the land should be open, on even terms, to all suitors. ***17** But this does not mean that it invites or encourages litigation. To the contrary, it deplores litigation.

In re Hite's Estate, 155 Cal. 436, 438, 101 P. 443, 444 (1909).

Many courts have also pointed to the likelihood that a will contest would generate family animosity and bring family disputes and the testator's private life into public view. Begleiter, *supra* at 636. The United States Supreme Court has also spoken to this issue:

> Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.

Smithsonian Inst. v. Meech, 169 U.S. 398, 415, 18 S. Ct. 396, 403, 42 L. Ed. 793 (1898).

Parker makes limited references to public policy concerns in her principal brief, primarily urging this Court to look to the Uniform Probate Code's ("UPC") adoption of a good faith and probable cause exception to the enforcement of no-contest clauses for guidance. From its original draft, finalized in 1969, the UPC has contained a section dealing with no-contest clauses. *See* Uniform Probate Code § 3-905 (1969). [4] Mississippi, in the forty-four years since the original draft of the UPC, has declined to adopt a statute modeled on § 3-905. At the 1992 session of the Mississippi Legislature, a bill modeled on the UPC was introduced to replace almost all of Mississippi's statutes dealing with decent and distribution, wills, and administration of testate and intestate estates. Robert A. Weems & Katherine L. Evans, *Mississippi Law of Intestate Succession, Wills, and Administration and the Proposed Mississippi Uniform Probate* ***18** *Code: A Comparative Analysis*, 62 Miss. L.J. 1, 4 (1992). The House Bill was passed by the House Judiciary "A" Committee and was sent to the entire House for a vote, but was withdrawn because of concerns about the effect of some of the provisions, as well as a general unfamiliarity with the bill. *Id.*

Although the Mississippi Legislature has declined to wholly adopt the UPC, from time to time it has enacted statutes closely resembling some of its provisions. *See Harvey v. Meador*, 459 So.2d 288, 292 (Miss. 1984) (discussing the adoption of Miss. Code Ann. § 93-13-251). It must be assumed that the Legislature had knowledge of its own proceedings, including the provision in the UPC dealing with no-contest clauses, and the lack of a Mississippi statute dealing with the same. *Ascher & Baxter v. Edward Moyse & Co.*, 101 Miss. 36, 57 So. 299 (Miss. 1912). Furthermore, when interpreting statutes, this Court has stated:

"that it is pertinent and proper for the court to resort to the history of the statutes... in order that the true intention of the Legislature may be deduced. We are conscious, however, of the fact that we may not substitute our own ideas and our own judgment of the expediency of such policy, but that the pole star is the will and intention of the Legislature." *White v. Miller*, 162 Miss. 296, 139 So. 611, 614 (Miss. 1932).

In this case, the exception that Parker urges this court to adopt has been codified in the UPC for forty-four (44) years, and was sent to the Mississsippi Legislature in 1992, where it was eventually withdrawn before a vote. *Weems*, at 4. In the following twenty-one (21) years, the Legislature has declined to enact any statute adopting the exception supported by Parker, despite demonstrating its willingness to adopt other provisions of the UPC. *Harvey*, at 292. It necessarily follows, then, that the silence of the Legislature on this issue is tantamount to a rejection of the exception itself.

***19** As previously stated, once a testator's intent is determined, the court must "give effect to such intent unless contrary to law or public policy." *Cross v. O'Cavanagh*, 198 Miss. 137, 21 So.2d 473, 474 (Miss. 1945); *See also* 96 C.J.S. *Wills* § 902. Here, the Chancellor determined that B.D. intended for the no-contest clause to apply regardless of good faith and probable cause. (R. 1072-1074). Parker has not shown that the enforcement of the no-contest clause regardless of good faith and probable cause is in conflict with any established rule of law in Mississippi or the public policy of Mississippi. As such, B.D.'s wishes should be respected and Parker should be excluded from taking under the will as a result of her challenge to it, regardless of good faith and probable cause.

B. No Contest Clauses Create a Conditional Gift of a Type Recognized by Mississippi Courts

Despite the lack of authority in Mississippi directly addressing no-contest provisions, there are a few Mississippi cases that deal directly with clauses that place similar conditions on gifts in a will. In *Pringle v. Dunkley*, 22 Miss. 16 (1850) the testator divided his estate equally between his wife Elizabeth and his three children, to be held equally "so long as the said Elizabeth shall continue my widow, but upon the event of her marrying, then her interest to go to my heirs above named, in equal portions." *Id.* at 17. The *Pringle* court stated that "[t]his is strictly a limitation, a gift to the wife during her widowhood, and such limitations have been uniformly sustained as valid." *Id* at 18; *See also Hale v. Neilson*, 112 Miss. 291, 72 So. 111 (1916); *Pat v. Evans*, 97 So.2d 737 (Miss. 1957). The clause presented in the will in Pringle is clearly analogous to the no contest clause in B.D.'s 2010 Will. In *Pringle*, the testator bequeathed to his widow certain portions of his estate, so long as she did not remarry. *Id.* However, she did remarry, and the Court upheld enforcement of the provision. *Id.* In the instant case, B.D. bequeathed to Parker certain portions of his estate, so long as she did not challenge ***20** the 2010 Will. However, Parker unsuccessfully challenged the 2010 Will and this Court, should similarly uphold the provision.

C. Parker Should be Estopped from Arguing that the No Contest Clause is Unenforceable

During closing arguments to the jury, Parker's attorney displayed the 2010 Will's no-contest clause to the jury and asked them to read and consider it during their deliberations. (T.T. 509:1-29; T.T. 510:1-5; S.T. 19:7-9). By specifically asking the jury to consider the forfeiture clause, Parker fully conceded its legitimacy and enforceability and should be judicially estopped from arguing that the clause is unenforceable. The doctrine of judicial estoppel precludes a party "... from taking a position which is inconsistent with the one previously assumed in the course of the same action or proceeding." *Grand Casino Tunica v. Shindler*, 772 So.2d 1036, 1039 (Miss. 2000) (*quoting Mississippi State Highway Comm'n v. West*, 181 Miss. 206, 179 So. 279, 283 (Miss. 1938)). The doctrine is applied in order to prevent parties from employing intentional self-contradiction as a means of obtaining unfair advantage. *Copiah County v. Oliver*, 51 So.3d 205, 207 (Miss. 2011).

Here, Parker asked the jury to consider the ramifications of the no-contest clause if the 2010 Will was declared valid. (T.T. 509:1-29; T.T. 510:1-5; S.T. 19:7-9). Now, Parker seeks to benefit from taking the contradictory position that, although the 2010 Will is valid, the no-contest clause cannot be enforced against her. Additionally, quasi-estoppel is a long-standing equitable principle that "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously

taken, and applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Bailey v. Estate of Kemp*, 955 So.2d 777, 782 (Miss. 2007); *see also Kea v. Keys*, 83 So.3d 399, 406 (Miss. Ct. App. 2011) (explaining the application of quasi-estoppel in a non-contract setting). Here Parker clearly acquiesced to the validity of the clause ***21** by asking the jury to consider it during their deliberations and further accepted the benefit of the jury's consideration of the clause during their deliberation. (T.T. 509:1-29; T.T. 510:1-5; S.T. 19:7-9).

D. Even if this Court Determines that a Good Faith and Probable Cause Exception to the Enforcement of No Contest Clauses Should be Adopted, Parker Cannot Establish that her Challenge of the 2010 Will Meets that Standard

Initially, Parker's argument that she acted with good faith and probable cause contains no citations to the record despite making repeated references to the underlying facts. See Appellant's Principal Brief, pp. 21-30. Arguments advanced on appeal "must contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, **and parts of the record relied on.**" Miss. R. App. P. 28(a)(6) (emphasis added). "Failure to comply with M.R.A.P. 28(a)(6) renders an argument procedurally barred." *Birrages v. Illinois Cent. R.R. Co.*, 950 So.2d 188, 194 (Miss. Ct. App. 2006); *see also Rogers v. State*, 994 So.2d 792 (Miss. Ct. App. 2008). Because Parker's argument contains no record citations despite the command of Miss. R. App. P. 28(a)(6), it is procedurally barred from consideration by this court.

Even in the event that this court considers Parker' argument, the record clearly indicates that Parker's challenge to the 2010 Will cannot meet any standard of good faith and probable cause. At trial, Parker offered only scant, questionable evidence to support her theories of lack of testamentary capacity and undue influence. The Chancellor addressed the deficiencies in Parker's evidence after the close of her case in chief: "[t]o be openly honest with both parties, had this been a bench trial whereby a Rule 41 dismissal was sought, the Court would have granted that dismissal... I would characterize ... the contestant's case in chief as weak." (T.T. 242:24-27; T.T. 243:5-7). The jury eventually rejected Parker's case as well. (T.E. 42; S.T. 29:23-28).

***22** Parker relies almost exclusively on the Tennessee case of *Winningham v. Winningham*, 966 S.W.2d 48 (Tenn. 1998) to support her assertion that she instituted her challenge against the 2010 Will with good faith and probable cause. In Winningham, the testator and his wife executed mutual and reciprocal wills in 1981 that named their daughter and son as virtually equal beneficiaries under the survivor's will. *Id.* Following the death of his wife, the testator executed a new will in which the portion of the estate devised to the daughter was reduced substantially to the benefit of the son. *Id.* The daughter discussed this situation with an attorney who advised her that the mutual and reciprocal wills executed in 1981 could not be revoked. *Id.* The daughter then authorized the attorney to file suit to have the 1981 will declared to be the testator's last will and testament. *Id.* However, a short time after the suit was filed, the daughter's attorney advised her that he had been mistaken regarding the law and that the mutual and reciprocal wills could, since the enactment of a 1978 statute, be revoked. *Id.* As a result, he recommended that the suit immediately be dismissed, which it was. *Id.* Nevertheless, the brother instituted proceedings to enforce a no-contest clause contained in the testator's will. *Id.*

One of the questions considered by the *Winningham* court on appeal was whether the daughter's claim was instituted with good faith and probable cause. *Id.* In analyzing that question, the Winningham court looked to Tennessee jurisprudence regarding findings of probable cause in malicious prosecution proceedings. *Id.* The legal standard in Tennessee for probable cause in malicious prosecution proceedings, however, is different from the legal standard in Mississippi.[5] As such, the *Winningham* decision can hardly be applied to the case at hand. Furthermore, in Mississippi, "proof of lack of probable cause on any one element of the ***23** crime charged and which forms the basis of the action is sufficient to establish this element of the tort [of malicious prosecution]." *C&C Trucking Co. v. Smith*, 612 So.2d 1092, 1100 (Miss. 1992) (citation omitted). As such, if Mississippi's malicious prosecution standard were to be employed as a guideline for assessing good faith and probable cause in the instant case, then Parker would necessarily have to show that probable cause existed as to the accusations that Benoist exerted undue influence on B.D. and that B.D. lacked testamentary capacity.

More importantly, the *Winningham* court did provide a list of factors that it believed went to the good faith aspect, but, with regard to probable cause, simply stated: "many of the facts which show that Ms. Winningham acted in good faith also

demonstrate that there was reasonable justification for the action taken." *Winningham,* at 63. Parker's argument, however, proceeds on the assumption that proof of good faith is equivalent to proof of probable cause. Futhermore, the *Winningham* court clearly based its determination that probable cause existed based on the representations made by the daughter's attorney: "The initiative to enforce the provisions of her father's 1981 will with legal proceedings was taken by her counsel, whose legal knowledge she apparently had no reason to question. Based on counsel's statement, the law would give her what she though was her just and fair due. Had the law been in 1992 what it was prior to 1978, there would have been no reason not to file suit. Under these circumstances, justice does not require that Ms. *Winningham* bear full responsibility for her lawyer's performance." *Winningham,* at 53. The Winningham court also emphasized that, "when advised there was no basis on which the 1992 will could be successfully contested, [Mrs. *Winningham*] discontinued any plans or efforts to attack the later will." Winningham, at 53. In this case, after the filing of the original petition, Benois's attorney, Mrs. Cowan, and Natalie Hutto, the drafter of the 2010 Will, met with Parker's attorney and presented much of the evidence that Benoist utilized at trial to establish the ***24** validity of the 2010 Will. (S.T. 23:19:29). Even in the face of this evidence, Parker continued to attack the validity of the 2010 Will.

Despite Parker's assertion, *Winningham* is only superficially similar to the case at hand. Parker's attorneys were not mistaken as to the law and Parker did not cease her contest even when presented with evidence clearly establishing that B.D. did not lack testamentary capacity and was not unduly influenced by Benoist. These two factors weighed heavily in the *Winningham* decision. *Winningham,* at 63. Furthermore, the Winningham decision employed Tennessee malicious prosecution law as a guideline for assessing good faith and probable cause. Because Tennessee malicious prosecution law is substantially different from Mississippi malicious prosecution law, applying the *Winningham* decision to the instant case is difficult, if not impossible.

Parker also asserts that support for her position that she initiated this will contest in good faith and with probable cause is found in one Mississippi case that is easily distinguishable from the case at hand, *Foster v. Ross,* 804 So.2d 1018 (Miss. 2002). In that case, Foster and his attorney appealed the trial court's decision to hold them liable for attorney's fees and costs under the Litigation Accountability Act of 1988 after they offered virtually no evidence supporting the existence of a confidential relationship, their sole grounds for filing the action for the return of *inter vivos* gifts. *Id.* The Court concluded that Foster's pursuit of his claim, despite the lack of evidence, supported the imposition of sanctions because the claim was filed without substantial justification in contravention of Miss. Code Ann. §§ 11-55-1 et seq. *Id.*

Parker claims that the inverse of the ruling in *Foster* is that if a confidential relationship is proven, then good faith and probable cause exist for contesting a will. See Appellant's Principal Brief, p. 29. This is simply not the case. The inverse of the *Foster* decision is that if an attorney or party brings an action with substantial justification, then sanctions will not be ***25** imposed on them. The *Foster* decision \ has nothing to do with the instant case and Parker has cited no authority, from this jurisdiction or elsewhere, in support of her position that the finding of a confidential relationship is, in any way, determinative of whether or not a will contest was instituted with good faith and probable cause.

In this case, Parker urges this court to adopt an unworkable standard for a good faith and probable cause exception to the enforcement of no-contest clauses, based on the laws of the state of Tennessee. Parker then attempts to argue, without any citations to the record, that the facts establish that she challenged the 2010 Will with good faith and probable cause under that unworkable standard. Failure to cite to the record procedurally bars this Court from considering Parker's argument that she met the good faith and probable cause standard she urges the Court to adopt. *Birrages,* at 194. Furthermore, the record clearly shows that, even under the standard Parker urges this Court to accept, Parker's challenge was not brought with good faith and probable cause. Consequently, there is no basis for this Court to reverse the Chancellor's decision, even if a good faith and probable cause exception to no-contest clauses is adopted.

E. Even if this Court Determines that a Good Faith and Probable Cause Exception to the Enforcement of No Contest Clauses Should be Adopted, that Holding Should Only be Applied Prospectively

In the event that this Court determines that a good faith and probable cause exception should apply to no-contest clauses, such a holding should only be enforced prospectively. There can be no argument that "the public relies on the law as written until it is

declared invalid." *Presley v. Mississippi State Highway Comm'n,* 608 So.2d 1288, 1298 (Miss. 1992), *superseded by statute on other grounds.* With regard to the enforcement of no-contest clauses, the only applicable law in Mississippi is that the testator's intent is controlling, as discussed previously. This court has "often declared [its] pronouncements ineffective with regard to certain past and, in some instances, future conduct in order to give the Legislature time to act or otherwise to avoid ***26** harsh results." *Id.* In *Presley,* this Court looked to the United States Supreme Court's holding in *Chevron Oil Co. v. Huson* for guidance on the nonretroactive application of judicial decisions. 404 U.S. 97, 106 (1971). Chevron announced a three-prong test for determining whether a decision should apply nonretroactively: (1) the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits in each case must be weighed by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) if the results of weighing the inequity imposed by retroactive application show that substantial injustice or hardship would result from retroactive application, then there is ample basis for applying a holding prospectively. *Id.*

With regard to the instant case, there can be no question that a holding subjecting no-contest clauses to a good faith and probable cause exception would establish a new principle of law in Mississippi. Furthermore, it is clear that applying such a holding in this case and to similarly situated testators would work substantial injustice. Prior to his death, B.D. had no reason to expect that his last wishes, as represented by the no-contest clause, would not be respected. Consequently, he had no reason to take other measures to ensure that his estate was disposed of as he wished. If such a holding is adopted, this Court should only enforce that holding prospectively to place other similarly situated testators on notice that no-contest provisions are subject to a good faith and probable cause exception and allow them time to revise their wills accordingly or make alternate arrangements for the disposition of their property.

III. The Trial Court Properly Ruled that Benoist, as Executor of the Estate, pay a Retainer of $20,000 to the Tollison Law Firm

Parker's second assignment of error is that the trial court improperly authorized the payment of a $20,000 retainer to the Tollison Law Firm to represent B.D.'s estate in the instant ***27** litigation. (R. 605-606). "Regarding attorney's fees, '[i]t is well-settled that the amount allowable as attorney's fees for services rendered in the administration of an estate rests within the sound discretion of the chancery court."' *Estate of McLemore v. McLemore,* 63 So.3d 468, 485 (Miss. 2011) (quoting *Barnes, Broom, Dallas & McLeod, PLLC v. Estate of Cappaert,* 991 So.2d 1209, 1211 (Miss. 2008). Further, "a trial court's decision regarding attorneys' fees will not be disturbed by an appellate court unless it is manifestly wrong." *Tupelo Redevelopment Agency v. Gray Corp., Inc.,* 972 So.2d 495, 521 (Miss. 2007). Statutes allow for the payment of attorney fees of executors from estate funds. See Miss. Code Ann. § 91-7-281 (Rev. 2004); Miss. Code Ann. § 91-7-299 (Rev. 2004). Section 91-7-299 provides that "the court may allow [an executor's] necessary expenses, including a reasonable attorney's fee, to be assessed out of the estate, in an amount to be determined by the court." *Id.*

In the case of *Kelly v. Davis,* 37 Miss. 76 (1859), the Supreme Court of Mississippi held that, although an executor does not have an imperative duty to defend a probated will when its validity is attacked, if he does so successfully, he may be credited with the expenses incurred in defense. *See also Hoskins v. Holmes Cnty. Cmty. Hosp.,* 99 So. 570, 573 (Miss. 1924). Furthermore, Article X, subsection O the 2010 Will empowers the Executor of the Estate "[t]o employ accountants, **attorneys,** investment advisors, money managers and such agents as they may deem advisable, and... to pay reasonable compensation for their services and to charge same to (or apportion same between) income and principal as they may deem proper." (T.E. 1;) (emphasis added). Both Mississippi law and the 2010 Will provide that the executor may retain an attorney to represent it in a will contest and pay that attorney out of the estate itself. Therefore, the trial court's authorization of the estate's payment of a retainer to the Tollison Law Firm did not constitute error.

***28** Parker cites two primary authorities in support of her assignment of error: *Clarksdale Hospital v. Wallis,* 187 Miss. 834, 193 So. 627 (1940) and *Matter of Estate of Philyaw,* 514 So.2d 1232 (Miss. 1987). However, both cases are readily distinguishable from the case at hand. In *Philyaw,* a creditor of the estate was eventually appointed as administratrix and sought

reimbursement for her attorney fees. *Philyaw supra.* The evidence showed that, while acting as administratrix, this creditor only filed one pleading that was not in furtherance of recovering her own claim against the estate. *Id.* In *Clarksdale Hospital*, the testator bequeathed to the Clarksdale Hospital a sum of $30,000. *Clarksdale Hospital supra.* The executor and several of the devisees and legatees unsuccessfully contested the hospital's legacy. *Id.* The hospital then sought reimbursement of its attorney fees from the estate, which the chancellor disallowed. *Id.* The hospital then unsuccessfully appealed the denial of attorney fees. *Id.*

The most important distinction between these two cases and the instant case, however, is that neither *Philyaw* or *Clarksdale Hospital* involved will contests. Instead, both of the parties seeking reimbursement of attorney fees employed their attorneys to ensure that they obtained those fees from the estates under valid wills and to the detriment of the other interested parties. Here, Parker is attempting to assert that the very act of defending the 2010 will constitutes an action solely for the benefit of Benoist and to the detriment of herself because Parker stood to gain more from the 1998 will. This simply is not a legally cognizable argument. "[W]here one will has been admitted to probate in common form under the laws of this State as the last will of a deceased testator, it will remain the last will of the testator unless (within the time allowed by law) it is set aside by an order of the chancery court upon a contest and issue devisavit vel non" *Perry v. Aldrich*, 251 Miss. 429, 169 So.2d 786, 791 (Miss. 1964). That is, without an order setting aside the 2010 Will, the 1998 Will remains an invalid instrument. Consequently, Parker ***29** cannot be heard to argue that Benoist's defense of the 2010 Will was an act designed to deprive her of greater gains under an instrument that was and continues to be invalid.

Additionally, as a policy matter, reversing the chancery court's decision here would effectively mean that an executor, if also a beneficiary under the will, could not be compensated out of the estate's assets for retaining an attorney to defend the will on behalf of the estate. Consequently, executors who are also beneficiaries would be forced to defend wills with their own funds. Practically speaking, such a rule would, undoubtedly, deter those executors who are also beneficiaries from defending wills, no matter how strong the facts supporting the validity of the will, because of the necessity of having to retain the attorney themselves. Ultimately, such a scenario would also result in testators being discouraged from appointing their beneficiaries as their executors to ensure that their wills would be defended from any attack. Such a result would completely undermine the most basic principles of Mississippi law on wills and estates, that the testator should be able to dispose of his property as he sees fit and to select an executor of his own choosing to see to the disposition of his estate. *Cross v. O'Cavanagh*, 198 Miss. 137, 21 So.2d 473, 474 (Miss. 1945); *See also* 96 C.J.S. *Wills* § 902.

IV. The Trial Court Properly Denied Parker's Petition to Appoint a Temporary Administrator

The Appellant's *Amended Petition to Remove William D. Benoist as Executor* requested, in part, that the trial court appoint a temporary administrator in place of the Appellee pursuant to Miss. Code Ann. § 91-7-53. The Appellant based her request on allegations that the Appellee "diverted, and continues to divert, other assets of the Estate for his own personal use and benefit and to the detriment of Petitioner." (R. 400-406). The trial court, after hearing argument from counsel on the issue, found that "the factual issues are strongly disputed between the parties," and that, "[t]here is no uncontested evidence for the Court to remove William D. Benoist as the Executor of the Last Will and Testament of Billy Dean 'B.D.' Benoist." (R. 649-650).

***30** Miss. Code Ann. § 91-7-53 provides, in pertinent part: "whenever a last will and testament shall be contested, the chancery court or chancellor in vacation, on petition of any interested person, **may** appoint a temporary administrator if is shall appear necessary for the protection of the rights of the parties." Miss. Code Ann. § 91-7-53 (emphasis added). The sole authority pointed to by Parker in support of her position is *Sandifer v. Sandifer*. 237 Miss. 464, 115 So.2d 46 (Miss. 1959). Perhaps the most important distinction between Sandifer and the present case is that the lower court in Sandifer granted the appellee's petition to appoint a temporary administrator and the Mississippi Supreme Court, deferring to the chancellor's authority to make such determinations, upheld the grant of that petition. *Id.* The *Sandifer* court held: "[w]e think the chancellor should have wide discretion in applying this statute... [i]f the will is contested, the matter of appointing a temporary administrator is largely a matter for the chancellor's discretion and we should not reverse his action unless there is clear evidence of abuse of that discretion." *Id* at 47-48.

Here, Parker has pointed to no evidence in the record supporting the various allegations made within her principal brief regarding the Chancellor's denial of her motion to appoint a temporary administrator. See Appellant's Principal Brief pp. 33-35. In fact, the record does not contain a transcript of the hearing of this petition nor does it contain a statement of the evidence pursuant to Miss. R. App. P. 10(c). Thus, the only items in the record related to this issue are the Petition, Amended Petition, and Supporting Memorandum filed by the Appellant, the Responses to those Petitions filed by Benoist and the Estate and the Order entered by the trial court denying the petition. (R. 372-377; R. 387-399;R. 400-406; R. 546-552; R. 564-572; R. 605-606). Neither the original petition nor the amended petition were accompanied by any exhibits supporting the allegations contained within them. (R. 372-377; R. 387-399;R. 400-406; R. 546-552; R. 564-572; R. 605-606). That is, the only portions of the record dealing with this issue are ***31** nothing but unsupported assertions made by counsel. As such, there is simply no evidence before this court upon which the Chancellor's denial of the Petition to appoint a temporary administrator may be reversed.

"The burden rests upon the appellant to provide a record that contains all information needed for an understanding of matters relied upon for reversal on appeal." *Wells v. Price*, 102 So.3d 1250, 1259 (Miss. Ct. App. 2012). Furthermore, "[i]ssues cannot be decided based on assertions from the briefs alone." *Pulphus v. State*, 782 So.2d 1220, 1224 (Miss. 2001). "It must be presumed that the rulings of the trial court were correct, and such presumption will prevail, unless the actual record supports the contrary view." *Shelton v. Kindred*, 279 So.2d 642, 644 (Miss. 1973). "Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them." *Mason v. State*, 440 So.2d 318,319 (Miss. 1983). "It is an appellant's duty to justify his arguments of error with a proper record, which does not include mere assertions in his brief, or the trial court will be considered correct." *Graham v. State*, 914 So.2d 1256 (Miss. Ct. App. 2005). Arguments advanced on appeal "must contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on." Miss. R. App. P. 28(a)(6). "Failure to comply with M.R.A.P. 28(a)(6) renders an argument procedurally barred." *Birrages v. Illinois Cent. R.R. Co.*, 950 So.2d 188, 194 (Miss. Ct. App. 2006); *see also Rogers v. State*, 994 So.2d 792 (Miss. Ct. App. 2008).

Once again, Parker's failure to cite to the record in her argument on this assignment of error procedurally bars consideration of that argument on appeal. Furthermore, even if this court attempted to undertake the task of combing through the record to find support for Parker's argument, it would be unsuccessful as there is no evidence in the record to support a finding that ***32** the Chancellor abused his discretion. Therefore, the decision of the lower court - denying Parker's request to remove Benoist as Executor of the Estate - should be affirmed.

RESPONDENT/CROSS-APPELLANTS' ISSUE ON APPEAL

V. The Trial Court Erred in Denying Attorney Fees to the Estate of Billy Dean "B.D." Benoist and William D. Benoist as provided for in the 2010 Will

The 2010 Will reads, in pertinent part: "such persons contesting my Will shall pay all attorneys fees and court costs associated with the Will contest or related action." (T.E. 1). As discussed previously, because there is no Mississippi case that directly discusses the enforcement of no-contest provisions in wills, there are, similarly, no cases specifically discussing whether a provision in a no-contest clause providing that any party that unsuccessfully challenges a will is responsible for the attorney fees incurred in defending against that attack is enforceable.

Authority in other jurisdictions provides that an unsuccessful will contestant is responsible for the attorney fees and costs of defending a will against attack. *See Bleidt v. Kantor*, 412 So.2d 769, 771 (Ala. 1982) (holding that the costs of any will contest must be paid by the party contesting if he fails); *Matter of Estate of Ambers*, 477 N.W.2d 218 (N.D. 1991) (holding a devisee should not be forced to bear the expense of upholding a will challenged by an heir or another devisee); *In re Estate of Thiel*, 196 P.3d 988 (Ok. Civ. App. 2008) (holding that 58 O.S.2001 § 66 allows the successful party in a will contest to recover attorney fees and expenses from the unsuccessful party); *In re Estate of King*, 920 N.E.2d 820 (Mass. 2010) (upholding a statutory award of the prevailing contestant's attorney's fees and costs).

In *Matter of Estate of Ambers*, George Ambers last will bequeathed his entire estate to Gail and Byron Nelson, a family that rented some of his farmland. *Matter of Estate of Ambers*, 477 N.W.2d 218 (N.D. 1991). Ambers' heirs at law challenged this will, alleging that the Nelsons had unduly influenced Ambers. *Id.* The trial court allowed Gail Nelson to recover the costs of her defense of the will from the contestants, which the contestants appealed as error. *Id.* ***33** The *Ambers* court determined that the contestants' challenge did not benefit the estate and was not intended to benefit the estate - its sole purpose was to effect a change in who received the estate. *Id.* Furthermore, the court stated: "to rule as the Contestants urge would diminish the estate and the Nelsons, as the sole beneficiaries of the will, would have to bear the entire expense of upholding the will challenged by the Contestants." *Id* at 224. A devisee should not "be forced to bear the expense of upholding a will challenged by an heir or another devisee in a proceeding that was not intended to benefit the estate." *Id* at 224.

In the instant case, as a consequence of the enforcement of the no-contest clause and its exclusion of Parker from taking under the 2010 Will, Benoist became the only beneficiary under the 2010 Will. (T.E. 1). Effectively, this means that even though Benoist may recover attorney fees from the Estate as discussed previously, because he is the sole beneficiary of that Estate, Benoist would have to bear the entire expense of upholding the will challenged by Parker. Benoist's inheritance has been greatly diminished by the attorney's fees the Estate has had to pay to defend against Parker's attack on B.D.'s 2010 Will. B.D. clearly intended for unsuccessful challengers to pay for the costs incurred from any attack on his will. Furthermore, because Benoist had the right as a beneficiary under the will to resist Parker's challenge of the will, he should have been allowed to recover the money he paid out of his own pocket to defend the applicability of the no-contest clause. Finally, as in *Ambers*, Parker's challenge to the 2010 Will was not to benefit the estate, but motivated out of pure self-interest in increasing the amount of her bequest. Consequently, this Court should adopt the reasoning employed by the Ambers court and reverse the chancellor's decision not assess attorneys' fees and costs against Parker.

CONCLUSION

Parker's arguments in support of her three assignments of error are, in turn, unsupported by relevant authority and the record, and unworkable under Mississippi law. Mississippi, ***34** throughout its history, has placed an emphasis on respecting the rights of a testator to dispose of his property as he sees fit. The enforcement of no-contest clauses without a good faith and probable cause exception reflects this long-standing policy. Furthermore, Mississippi law clearly allows for the executor of an estate to recover attorneys' fees incurred in defending a will from attack from the estate itself. Likewise, neither the record nor any relevant case law support Parker's assertion that the Chancellor erred when he denied Parker's Petition to remove Benoist as executor of B.D.'s Estate. For the foregoing reasons, appellants/cross-appellees respectfully request that this Court affirm the lower court's determinations with regard to the Appellant's three assignments of error on appeal.

The Chancellor did err when he declined to assess attorney's fees against Parker pursuant to the terms of B.D.'s 2010 Will and its no-contest provision. Under any circumstance surrounding the applications of a provision in a will, the testator's intent is the paramount concern. Not only did the 2010 Will provide for attorneys fees to be assessed against an unsuccessful challenger, it would be inequitable to force Benoist to wholly bear the cost of defending the 2010 Will from attack. Consequently, the Chancellor's decision to deny attorney's fees to the Estate and to Benoist, individually, should be reversed and rendered.

Footnotes

1 *Citing In re Estate of Stralem*, 695 N.Y.S.2d 274 (Sur. Ct. 1999) (finding challenge to appointment of executors not a contest to the instrument, therefore outside the scope of the forfeiture clause); ***Elder*** *v.* ***Elder***, 120 A.2d 814 (R.I. 1956) (enforcing forfeiture clause under cardinal rule of construction in which entire, clearly-expressed intent of testator must be given effect if not contrary to law or public policy); *Sullivan v. Bond*, 198 F.2d 529 (D.C. Cir. 1952).

2 *Citing Haynes v. First Nat. State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981); *Estate of Keller*, 629 A.2d 1040 (P.A. 1993); *In re Estate of Mumby*, 982 P.2d 1219 (Wash. Ct. App. 1999) (enforcing clause on finding daughter contested will in bad faith).

3 *Citing* *Barry v. American Sec. & Trust Co.*, 135 F.2d 470, 473 (D.C. Cir. 1943); *Donegan v. Wade*, 70 Ala. 501, 504 (1881); *In re Estate of Seymour*, 600 P.2d 274, 278 (N.M. 1979).

4 Available at http://www.uniformlaws.org/shared/docs/probate% 20code/upc_scan_1969.pdf

5 Tennessee Courts defined the existence of probable cause in the context of a malicious prosecution suit as being independent of the subjective mental state of the prosecutor, requiring "only the existence of such facts and circumstances sufficient to excite in a reasonable mind the beleif that the accused is guilty of the crime charged." *Winningham, citing* *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 248 (Tenn. 1992). On the other hand, in Mississippi, showing that probable cause exists requires proof of "(1) a subjective element - an honest belief in the guilt of the person accused and (2) an objective element - reasonable grounds for such belief." *McLinton*, 792 So.2d at 973.

End of Document